

STATE OF MICHIGAN  
COURT OF APPEALS

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JEFFREY A. WING,

Plaintiff-Appellant,

v

MASCOTECH TUBULAR PRODUCTS, INC.,

Defendant-Appellee.

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UNPUBLISHED

December 20, 2002

No. 233703

WCAC

LC No. 00-000374

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

TALBOT, J. (*dissenting*).

I respectfully dissent.

Plaintiff worked for defendant from November 1993 until June 2000. Plaintiff worked as a welder for much of that time. Plaintiff's duties often involved repetitive work, long hours, and long weeks. Plaintiff began experiencing discomfort and swelling in both arms in mid-1997. Over the next three years plaintiff missed work several times, sometimes for several months at a time, because of this problem.

The doctor who primarily treated plaintiff for the arm problems was Dr. Michael Fitzsimmons. Plaintiff first saw Fitzsimmons on June 8, 1998, and saw Fitzsimmons about a dozen times over the next few years. Fitzsimmons noted swelling in plaintiff's arms and concluded that returning to work aggravated plaintiff's condition, in light of plaintiff's history of becoming symptomatic after returning to work. Fitzsimmons described plaintiff's swelling as "mild" or "minimal" and at times Fitzsimmons detected virtually no symptoms. Fitzsimmons believed that plaintiff should work only with restrictions. Fitzsimmons did not see a meaningful change in plaintiff's condition between 1998 and 2000. Fitzsimmons ruled out many potential causes for plaintiff's symptoms and, in the end, could arrive at no specific diagnosis for the cause of plaintiff's condition. Fitzsimmons did not think plaintiff's condition required surgery or any other specific treatment. Fitzsimmons explained the "clinical pattern" he observed as: "Every time he worked, his symptoms would be worse. Every time he was off work for a period of time, his symptoms would improve."

Electromyographic and nerve conduction tests conducted on March 7, 2000 by Dr. Steven Gross produced no evidence of carpal tunnel syndrome, peripheral neuropathy, or cervical radiculopathy, among other things. Dr. Gross also ruled out a pinched ulnar or median nerve. Dr. David Hing also examined plaintiff. Hing noted "slight" soft tissue swelling and

“minimal tenderness” in plaintiff’s wrists on August 18, 1998. Hing diagnosed forearm muscle and tendon “inflammation.” Hing thought plaintiff should work only with restrictions which precluded repetitive tasks.

Dr. Ronald Rusko, a hand surgeon, examined plaintiff on February 29, 2000. The result of Rusko’s examination and neurological evaluation were within normal limits. Rusko concluded that plaintiff could return to his previous job without restrictions.

The magistrate discussed the evidence, found plaintiff credible, found Dr. Fitzsimmons more persuasive than Dr. Rusko, and found that plaintiff had proven that he had “a condition” which was aggravated by repetitive work and that plaintiff was entitled to benefits for periods when defendant did not offer plaintiff work within plaintiff’s restrictions. The magistrate awarded benefits for the closed periods of August 19, 1998 to March 2, 1999; April 27, 1999 to February 7, 2000; and February 20, 2000 to June 12, 2000. The magistrate further found that plaintiff was entitled to continuing benefits after June 23, 2000.

The WCAC adopted the magistrate’s opinion as to the underlying facts and medical testimony, but the WCAC did not agree with much of the magistrate’s reasoning. The WCAC noted that no medical testimony identified plaintiff’s underlying condition. The WCAC recognized that the magistrate found that plaintiff experienced symptoms associated with “a condition.” The WCAC agreed with plaintiff that it was not necessary to identify a specific condition in order for plaintiff to obtain benefits, but the WCAC concluded that plaintiff was entitled to benefits only for periods of time when he showed that the symptoms from his unidentified condition became disabling because of employment. In that regard, the WCAC noted that plaintiff experienced “temporal swelling and pain symptoms” which “abated or were minimal following periods of rest.”

Relying on Dr. Fitzsimmons’ records, the WCAC concluded that plaintiff’s temporary period of disability which commenced August 19, 1998 lasted only through November 2, 1998, a date when Fitzsimmons found that plaintiff’s symptoms were “nearly completely gone,” and that plaintiff’s period of disability which commenced February 20, 2000, ended on April 17, 2000, a date when Fitzsimmons found that plaintiff had virtually no complaints of pain and only minimal swelling. These findings led the WCAC to modify two of the three closed periods found by the magistrate.

Regarding the magistrate’s award of continuing benefits, the WCAC noted that plaintiff had proven only that his symptoms subsided after he was off work for a time. The WCAC recognized that plaintiff had testified that his swelling never completely subsided, but that plaintiff had also testified he noticed improvement two or three weeks after he last worked. The WCAC concluded that plaintiff had not shown “any duration of symptom aggravation after his last day worked” and that, given plaintiff’s history of abatement of symptoms in the absence of any clear work-related pathology, “there is no legal basis nor competent, material and substantial evidence on the whole record to support an open award.”

There is a clear distinction between this Court’s review of the WCAC and the WCAC’s review of the magistrate. The WCAC must consider the magistrate’s findings of fact conclusive if those findings are supported by competent, material and substantial evidence on the whole record. MCL 418.861a(3); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698-699;

614 NW2d 607 (2000); *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664, 670; 620 NW2d 313 (2000); *Boardman v Dep't of State Police*, 243 Mich App 351, 356; 662 NW2d 97 (2000). This Court's review of the WCAC is narrower in scope. "If there is any evidence supporting the WCAC's factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate, then the courts must treat the WCAC's factual findings as conclusive." *Mudel, supra* at 702-703, 706, 709. The judiciary "is simply not empowered to look beyond the WCAC's findings of fact." *Mudel, supra* at 706. This Court's review begins with the WCAC's decision, not with the magistrate's decision. *Mudel, supra* at 709. This Court does not independently review whether the magistrate's findings were supported by substantial evidence. *Mattison, supra* at 670.

The WCAC may make independent findings of fact provided the record is sufficient for administrative review and the WCAC does not engage in speculation. *Boardman, supra* at 356; *Mudel, supra* at 709-714. The WCAC may not merely substitute its judgment for that of the magistrate if there is substantial evidence supporting the magistrate's decision. *Mudel, supra* at 700. But, "[a]s long as the WCAC is presented with a record that allows it to intelligently make its own factual findings, the Legislature has declared that the WCAC is free to do so." *Mudel, supra* at 711.

In reversing the magistrate's open award the WCAC relied on the same facts the magistrate relied on, but the WCAC concluded that those facts did not establish entitlement to continuing benefits. The WCAC was correct. The salient facts are that plaintiff has "a condition" which becomes disablingly symptomatic from repetitive work, and then the symptoms subside after plaintiff is off work for a while. Such aggravated symptoms entitle an employee to benefits only during the time the symptoms are of disabling proportion. *Mattison, supra* at 671-672. As of the hearing date, August 1, 2000, plaintiff testified that he was feeling "a little bit better" but that there was still "slight swelling." The restrictions recommended by Dr. Fitzsimmons involved avoiding a symptomatic reoccurrence, rather than resolving the condition. The WCAC's finding that plaintiff did not have a continuing work-related disability is supported by the record.

Plaintiff was not entitled to continuing benefits merely because his employment caused his condition to become disablingly symptomatic. Plaintiff was entitled to benefits for as long as the work-aggravated symptoms persisted at a disabling level. *Mattison, supra* at 671. But plaintiff was not entitled to benefits just because it was likely that a return to work will make his condition symptomatic again. There was no finding by the magistrate or the WCAC that plaintiff's underlying condition was caused or pathologically aggravated by his employment. The magistrate merely found that plaintiff had "a condition."

Plaintiff argues that he did prove an underlying condition caused (or "triggered") by his employment, that condition being "inflammation." Neither the magistrate nor the WCAC made the finding plaintiff now advocates. Plaintiff relies largely on the testimony of Dr. Hing, but neither the magistrate nor the WCAC relied upon Dr. Hing for their findings.

Regarding the two closed periods modified by the WCAC, the WCAC's findings were well supported by the medical notes of Dr. Fitzsimmons.

/s/ Michael J. Talbot